UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 24th day of March, two thousand and nine.

PRESENT: HON. RALPH K. WINTER,
HON. BARRINGTON D. PARKER,
Circuit Judges,
HON. LOUIS F. OBERDORFER,[1]
District Judge.

David Itzhak Elkaslasi,

Petitioner-Appellant,

v.

SUMMARY ORDER
No. 06-0845

Eric H. Holder, Jr., Attorney General of the United States of America,[2]

Appellee.

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[1]The Honorable Louis F. Oberdorfer, of the United States District Court for the District of Columbia, sitting by designation.

[2] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Eric H. Holder, Jr. is automatically substituted for former Attorney General Michael B. Mukasey as the respondent in this case.

For *Petitioner-Appellant*: Alan Michael Strauss (Stanley H. Wallenstein, *on the brief*), New York, NY.

For *Appellee*: Shane Cargo (Sara L. Shudofsky, *on the brief*), Assistant United States Attorneys, *for* Michael J. Garcia, United States Attorney for the Southern District of New York, New York, NY.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that Petitioner-Appellant's petition for review is DENIED.

Petitioner-Appellant David Itzhak Elkaslasi petitions for review of a decision of the BIA which affirmed, without opinion, a decision of Immigration Judge Bukszpan ("IJ") pretermitting Elkaslasi's application for cancellation of removal and for a waiver of admissibility and ordering him removed. We assume the parties' familiarity with the underlying facts and the procedural history of the case, as well as the issues presented on appeal.

Elkaslasi, an Israeli citizen, became a U.S. permanent resident in 1983. In 2002, Elkaslasi pleaded guilty to conspiring to smuggle merchandise and commit bribery in violation of 18 U.S.C. § 371, and to smuggling merchandise into the United States in violation of 18 U.S.C. § 545. In his plea agreement, Elkaslasi admitted that "the duties evaded by the defendant's offense totaled $119,000 and that the bribe payments totaled between $10,000 and $20,000." The district court ordered Elkaslasi to forfeit $119,000 and sentenced him to thirty days' imprisonment and a three-year term of supervised release.

When returning to New York after a trip to Israel, Elkaslasi was served with a Notice to Appear alleging that he was inadmissible as a consequence of his conviction. Elkaslasi filed applications for cancellation of removal under 8 U.S.C. § 1229b(a) and for a waiver of inadmissibility under 8 U.S.C. § 1182(h). The Department of Homeland Security requested that the IJ pretermit Elkaslasi's applications because Elkaslasi had been convicted of an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i), defined as "an offense that involves fraud or deceit in

which the loss to the victim or victims exceeds $10,000."

The IJ concluded and Elkaslasi does not challenge that his conviction fulfilled the "fraud" requirement of 8 U.S.C. § 1101(a)(43)(M)(i). Regarding the $10,000 loss requirement, the IJ reasoned that "since the two statutes criminalize both conduct that does and does not qualify as an aggravated felony, the Court must apply the 'modified categorical approach' to analyze the statutes and look to the record of conviction to determine whether the Respondent's conviction satisfies the $10,000 loss requirement of INA § 101(a)(43)(M)(i)." As admitted in his Plea Agreement (as well as elsewhere in the record of conviction), the "duties evaded by the defendant's offense totaled $119,000." The IJ concluded on the basis of this concession by Elkaslasi that the record of conviction "conclusively establishes that the Respondent's crime caused a loss to the victim of more than $10,000." Accordingly, the IJ pretermitted Elkaslasi's applications and ordered him deported. The BIA affirmed the IJ's decision without opinion and Elkaslasi appealed to this Court.

We review *de novo* the IJ's and the BIA's determinations of law. *Gao v. Gonzales*, 440 F.3d 62, 65 (2d Cir. 2006). Elkaslasi's primary argument on appeal is that the IJ erred in utilizing the modified categorical approach because the statutes at issue here are not "divisible." In assessing divisibility, we look to *Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001). In *Kuhali*, we analyzed and found divisible 22 U.S.C. § 2778, a statute that, like 18 U.S.C. § 545, lacks enumerated categories of criminal conduct. *See Kuhali*, 266 F.3d at 104, 106-07. Because we concluded that section 2778 was divisible, we applied the rule adopted by "a number of circuits (including our own) . . . [that the immigration] court may refer to the record of conviction . . . to determine whether the alien's criminal conviction falls within a category that would justify removal." *Id.* at 106; *see also Dickson v. Ashcroft*, 346 F.3d 44, 48-49 (2d Cir. 2003). In light of the fact that "§ 2778 encompasses the export not only of firearms but also of ammunition," with

"only the former crime constitut[ing] a removable offense," we held that "it was entirely proper for the immigration judge and the Board to rely on the judgment of conviction to ascertain whether Kuhali had in fact conspired to export firearms." *Kuhali*, 266 F.3d at 107.

We find that section 545 is divisible, in that it encompasses both removable and non-removable conduct, *i.e.*, smuggling of merchandise worth $10,000 or more, and smuggling of merchandise worth less than $10,000, respectively. In light of this finding, we conclude that the IJ properly applied the modified categorical approach and looked to the record of conviction that conclusively established a loss exceeding $10,000.

We have considered Petitioner's other contentions and find them to be without merit.

Accordingly, for the reasons set forth above, the petition for review is DENIED.

For the Court
Catherine O'Hagan Wolfe, Clerk

By: _____